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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TECHNICAL PUBLICATIONS INSTITUTE and the owners and operators thereof, and FRANK CSASZAR, its manager, Appellants, v. STANLEY MOSK, Attorney General of the State of California, Appellee.	CIVIL ACTION FILE NUMBER 17385

MOTION TO DISMISS APPEAL

NOTICE OF MOTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

CERTIFIED COURT RECORDS
Exhibit A:
Complaint for Preliminary Injunction and For Permanent Injunction (Education Code § 29017)

Exhibit B:
Stipulation to Entry of Judgment Permanently Enjoining Defendants Technical Publications Investment Corporation, Technical Publications Institute, Inc., Barnarr R. Cannon and Frank Csaszar and for Dismissal as to Defendant

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TECHNICAL PUBLICATIONS INSTITUTE and the owners and operators thereof, and FRANK CSASZAR, its manager, Appellants, v. STANLEY MOSK, Attorney General of the State of California, Appellee.	No. 17385 MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal from the order of the United States District Court of the Southern District of California, Central Division, entered December 15, 1960, taken by appellants by notice of appeal filed January 9, 1961, upon the grounds that:

1. the order appealed from is nonappealable;
2. this case has become moot subsequent to the filing of notice of appeal;
3. appellants have failed to comply with the Federal Rules of Civil Procedure governing appeals.

This motion is based upon the Transcript of Record

and Transcript of Record re Preliminary Hearing pursuant to Rule 75(j), F.R.C.P., on file herein, together with the Notice of Motion, Memorandum of Points and Authorities in Support of Motion and Exhibits A, B and C, attached hereto.

Dated: This 12th day of July, 1962.

STANLEY MOSK, Attorney General
NORMAN L. EPSTEIN,

Deputy Attorney General

NORMAN L. EPSTEIN

By_____
NORMAN L. EPSTEIN
Deputy Attorney General

Attorneys for Appellee

NOTICE OF MOTION

NOTICE IS HEREBY GIVEN that the foregoing motion will be brought on for hearing before the United States Court of Appeals for the Ninth Circuit in its courtroom, Sixteenth Floor, United States Post Office and Courthouse Building, Los Angeles 12, California, on Monday, September 10, 1962, at 9:30 a.m., or as soon thereafter as counsel may be heard.

STANLEY MOSK, Attorney General
NORMAN L. EPSTEIN,
Deputy Attorney General

NORMAN L. EPSTEIN

By_____
NORMAN L. EPSTEIN
Deputy Attorney General

Attorneys for Appellee

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

PRELIMINARY STATEMENT

Appellants appealed from the order of the United States District Court dated December 12, 1960, and entered December 15, 1960 denying their request for a temporary restraining order. (Transcript of Record, hereinafter referred to as "Tr. Rec.", pp. 22-25, 27.) While the Court declined, ex parte, to convene a three-judge statutory court due to the lack of a substantial federal question, it did not dismiss the Petition, but permitted appellants' request for a three-judge court, for preliminary and permanent injunctions and for declaratory relief to be determined upon adversary pleadings following service of the Petition. (Tr. Rec. pp. 22-24.)

The order appealed from is neither the final decision of a district court (28 U.S.C., Section 1291), nor an interlocutory order specified in 28 U.S.C., Section 1292(a), nor an interlocutory order with respect to which a district judge has certified the presence of a "controlling question of law as to which there is substantial ground for difference of opinion", as provided in 28 U.S.C., Section 1292(b). It follows that the order is not appealable, and that the appeal therefrom should be dismissed.

Dismissal of the appeal is also required by the mootness of the case. Subsequent to entry of the order

not only has the entire proceeding been reduced to final judgment in the District Court, by the terms of which the action was dismissed, but, in addition, all of the appellants, save one, have stipulated to an injunction by the California Superior Court restraining them from carrying on the very activities whose investigation they sought to enjoin below. The single appellant not so enjoined has declared under oath in the California Superior Court proceedings that she no longer has any interest in such activities.

Finally, by their failure to file a Statement of Points for five months following the time it was due (Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17.6), and by their failure to post a bond on appeal at any time (Federal Rules of Civil Procedure, Rule 73(c)), appellants have flagrantly disregarded mandatory rules established for proceedings on appeal.

For each of these reasons -- non-appealability of the order below, mootness of the case, and disregard of the rules on appeal -- it is respectfully submitted that the appeal should be dismissed.

STATEMENT OF THE CASE

Appellants' action was commenced on December 12, 1960 by the filing of their Petition for a statutory three-judge court, a temporary restraining order, declaratory relief and preliminary and permanent injunctions restraining the Attorney General of the State of California, and the State of California, from enforcing Sections 29001-

29020 of the California Education Code, and Sections 11183-11188 of the California Government Code.[1]

(Tr. Rec. pp. 3-21.)

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[1] While the Petition below (Tr. Rec. p.3), the Notice of Appeal (Tr.Rec., p.27), and the Appellants' Statement of Points (Tr.Rec.,p. 32) named both the Attorney General of California and the State of California as defendants or appellees, subsequent filings of appellants ("Motion and Affidavit in Support of Motion" dated March 9, 1962; "Opening Brief on Appeal") name only the Attorney General. The same is true of the Transcript of Record.

Accordingly, it would appear that appellants have abandoned their appeal with respect to the State of California.

At any event, it is noted that separate motions to dismiss were filed on behalf of each named defendant (Transcript of Record re Preliminary Hearing Pursuant to Rule 75(j),F.R.C.P., hereinafter referred to as "Tr.Rec.Prel.", pp. 2,25, respectively), and that separate judgments of dismissal were filed with respect to each. (Tr.Rec.Prel.,pp. 52,54, respectively.)

Of course, a suit in federal court by private litigants against a state as such is prohibited by the Eleventh Amendment.

Starr v. Schram, 143 F.2d 561, 563 (6th Circ.1944);

Petty v. Tennessee-Missouri Bridge Commission, 254 F.2d 857, 862 (8th Circ., 1958).

Accordingly, it is respectfully requested that if this Court does not consider the appeal to have been abandoned with respect to the State of California, that this motion and supporting materials be considered on behalf of the State of California, as well as the Attorney General.

Federal jurisdiction was asserted under 28 U.S.C. Sections 2281, 2283 and 2284, relating to three-judge statutory courts, and 28 U.S.C., Section 2201, relating to declaratory relief. (Tr. Rec., p. 3.)

The Petition alleged, inter alia, that appellants publish and circulate courses in technical subject materials, charge fees for instruction offered, and give to students completing their courses certificates stating that they have satisfactorily completed the courses taken. (Tr.Rec.pp.6-8.) It is asserted that "Because of the attempted investigation of the Attorney General, the proceedings herein sought to be enjoined, [the value of the school had dropped to] less than $1,000,000 and unless an injunction is issued, the Institute may be entirely and totally destroyed." (Tr. Rec., p. 8.) This is apparently because there are rival institutions in the area, and the availability of student lists to them would ". . . cause great and irreparable damage and injury . . ." (Tr. Rec., p. 8) and because of alleged unfavorable publicity due to newspaper reporting of the investigation. (Tr. Rec., p. 20.)

The Petition recites the administrative subpoena duces tecum ad testandum issued by the Attorney General on May 11, 1960 (Tr. Rec., pp. 9-12), and the facts that appellants did not obey it, following which the Superior Court of the State of California issued its order on appellee's Petition ordering that they produce the records specified (September 20, 1960) and subsequently found them in contempt for disregarding the Court's order and fined them accordingly (November 18, 1960, stayed until December 10, 1960).

(Tr. Rec., pp. 12-14.) The California District Court of Appeal denied appellants' petition for prerogative writs, and the Supreme Court denied a petition for hearing. (Tr. Rec., p. 13.)

Multiple and overlapping grounds of asserted unconstitutionality are claimed, including violations of Article I, Section 10, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (Tr. Rec., pp. 14-20.)

On December 12, 1960, Judge Leon R. Yankwich denied appellants' ex parte request for a temporary restraining order and for convening of a three-judge statutory court, but permitted appellants to serve their complaint so that the matter might be resolved upon adversary proceedings. (Tr. Rec., pp. 22-25.)

It is from this order that appellants appeal. (Tr. Rec., pp. 27, 28.)

The Petition was subsequently served, following which appellee filed his motion to dismiss. (January 9, 1961.) (Tr. Rec. Prel. p. 2.) The District Court's Judgment of Dismissal was duly entered on March 15, 1961. (Tr. Rec. Prel., p. 52.)

Appellants' Statement of Points in the instant appeal was not filed until August 9, 1961. (Tr. Rec., pp. 32-33.) No bond on appeal pursuant to Rule 73(c) of the Federal Rules of Civil Procedure has ever been filed.

The certified records attached to this Motion (Exhibits A, B, C) establish that on February 16, 1961,

appellee, on behalf of the People of the State of California, filed a Complaint to permanently enjoin appellants[2] from issuing or conferring, or threatening to issue or confer, "diplomas" as that term is defined in Education Code Section 29001, without prior compliance with the California Education Code. (Exhibit A.)

Thereafter, on April 9, 1962, appellants stipulated with appellee that the Superior Court issue an injunction permanently enjoining, restraining and prohibiting each of the appellants, with the exception of Marie T. Cannon, as well as all persons acting under, by, through or on their behalf, from issuing or conferring, or threatening, promising or offering to issue or confer any writing evidencing the completion of any course of study in certain

[2] The Petition below was brought by "Technical Publications Institute and the Owners and Operators thereof, and Frank Csaszar, its manager." (Tr. Rec., p. 3.) The Complaint for injunctive relief filed in the California Superior Court was brought against "Technical Publications Investment Corporation, a corporation; Technical Publications Institute, Incorporated, a corporation; Barnarr R. Cannon; Marie T. Cannon; Patrick S. Mitton; Frank Csaszar, Does I to X," (Exhibit A). The corporate defendants were each alleged to be operating a school of technical writing known as Technical Publications Institute at the same address. The Cannons and Mitton were directors of one and the Cannons and Csaszar the directors and officers of the other. (Exhibit A, paragraphs V, VI.)

designated fields, or any other course which is "beyond high school" as that term is defined in Section 29001 of the Education Code, without having previously satisfied certain conditions set forth in the Stipulation. The Stipulation recited that the instant appeal is now pending before this Court, but did not purport to preserve any rights or standing which appellants might have had to prosecute it. Among its other provisions, the Stipulation provided for the dismissal of Marie T. Cannon, in view of her Declaration attached to the Stipulation. Mrs. Cannon's Declaration stated, under penalty of perjury, that she no longer had any connection with the other appellants and was powerless to answer for any of them or for the correspondence school business conducted by them, and that on or about May 5, 1961 she had relinquished all rights and claims to the correspondence school business of Barnarr R. Cannon (one of the owners of Technical Publications Institute). (Exhibit B.)

On April 12, 1962, the Court duly entered its formal Judgment by Court Pursuant to Stipulation, enjoining appellants as provided by the Stipulation. (Exhibit C.)

ARGUMENT

I

AN APPEAL DOES NOT LIE FROM THE ORDER OF THE DISTRICT COURT ENTERED DECEMBER 15, 1960

As we have noticed, the Court's Order of December 12, 1960, entered December 15, 1960, was restricted to a denial of appellants' request for ex parte relief. A determination with respect to convening of a statutory

three-judge court was postponed until the issue could be raised upon adversary pleadings, and the request for a temporary restraining order was denied. (Tr. Rec., pp. 22-25.)

In pertinent part, 28 U.S.C., Sections 1291 and 1292, provide:

Section 1291. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

Section 1292(a). "The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, . . .

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order

involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Determination of whether an order is appealable is, of course, fundamental (Connell v. Dulien Steel Products, 240 F.2d 414, 417 [5th Circ., 1957]), and goes to the jurisdiction of the appellate court. (Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 276 F.2d 931, 932 [3rd Cir., 1960]).

Obviously, the instant order of the District Court is neither a final decision, nor an interlocutory order involving receivership, admiralty or patent infringement. Jurisdiction to entertain the appeal must, therefore, be found, if at all, in subdivisions (a) (1) or (b) of 28 U.S.C., Section 1292.

As to the first of these (orders ". . . granting, . . . [or] refusing . . . injunctions . . ." [28 U.S.C., Section 1292(a) (1)]), it is clear that an order refusing

or allowing a temporary restraining order does not constitute an order "granting, . . . [or] refusing . . . [an] injunction. . . ."

St. Helen v. Wyman, 222 F.2d 890, 891 (9th Cir., 1955);

Connell v. Dulien Steel Products, supra (240 F.2d 414, 417-418 [5th Cir., 1957]);

Pack v. Carter, 223 Fed. 638, 640-641 (9th Cir., 1915).

The distinction between such an order and an interlocutory injunction, the refusing of which is appealable, is well stated in Houghton v. Meyer, 208 U.S. 149, 156, 28 S. Ct. 234, 236, 52 L.Ed. 432 (1908), quoted in Pack v. Carter, supra (223 Fed. 638, 640-641 [1915]):

> "'" A temporary restraining order is distinguished from an interlocutory injunction, in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court."'"

In Connell v. Dulien Steel Products, supra (240 F.2d 414, 418 [5th Circ., 1957]), the Fifth Circuit stated the reasons for disallowance of appeals from orders granting or denying temporary restraining orders

as follows:

". . . The practical reasons for not generally allowing appeals from temporary restraining orders are that (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal (which accounts for the paucity of cases on this point), and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts. Where, as here, the duration of the order barely extends beyond 20 days and even though issued after notice (perhaps insufficient) we think it is not a temporary injunction and appealable. Appellant should have waited for another two weeks from the date on which he filed this appeal, at which time the trial court could have disposed of the question whether enforcement of the state judgment should be enjoined pending a full trial on the merits."

Cf. Davis v. Hayden, 238 Fed. 734, 736-737 (4th Circ., 1916), cert. den. 243 U.S. 636, 37 S. Ct. 400, 61 L. Ed. 941 (1917).

While the addition of subdivision (b) to 28 U.S.C.,

Section 1292 by an amendment in 1958 (Public Law 85-919) permits discretionary appeals from interlocutory orders not otherwise specified in Section 1292, appellants have not even attempted to satisfy the requisites specified in that subdivision for such review. Before an appeal will lie pursuant to Section 1292(b), it is necessary, first, "that the district judge making the order sought to be appealed from shall have stated in writing 'in such order' that in his opinion 'such order' involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", and, second, that the appellant apply to the Court of Appeals for permission to appeal under this subdivision within ten days of the entry of the order.

Milbert v. Bison Laboratories, 260 F.2d 431, 435 (3rd Circ., 1958).

In this case, the District Judge has made no such statement as is required by the subdivision, nor does it appear that he has ever been requested to do so. (See Tr. Rec. Prel., pp. 52-53.)

In the absence of any ground upon which appealability of the order below can be sustained, it is submitted that the appeal taken must be dismissed. (St. Helen v. Wyman, supra (222 F.2d 890, 891 [9th Circ., 1955]).)

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II

THE DENIAL OF A TEMPORARY RESTRAINING ORDER HAS BECOME MOOT

A. By the Subsequent Judgment of Dismissal.

On the same day appellants filed their Notice of Appeal from the instant order of the District Court (Tr. Rec., p. 27), appellee moved the Court to dismiss the entire Petition. (Tr. Rec. Prel., p. 2.) On February 28, 1961, this motion was granted (Tr. Rec. Prel., p. 50), and a Judgment of Dismissal was duly entered on March 15, 1961. (Tr. Rec. Prel.,p. 52.)

It is obvious that following entry of judgment dismissing appellants' entire Petition, any questions going to the previous denial of their ex parte request for a temporary restraining order became moot.

See Oakland Dock & Warehouse Co. v. United States, 193 F.2d 493, 494 (9th Cir., 1951);

Sobel v. Whittier Corp., 195 F.2d 361, 363 (6th Circ., 1952);

Leader Clothing Co. v. Fidelity and Casualty Company of New York, 227 F.2d 574, 576 (10th Circ., 1955).

B. By the Stipulation for Judgment and Final Judgment Pursuant Thereto of the Superior Court of the State of California.

On February 16, 1961, a date subsequent to the instant order and Notice of Appeal and prior to the Judgment of Dismissal, appellee filed a Complaint in the Superior

Court of the State of California seeking to permanently enjoin the instant appellants, together with their officers, agents, servants and employees, from issuing or conferring or threatening to issue or confer any diploma without prior compliance with the California Education Code. (Exhibit A, p. 10.)

The provisions of the Education Code referred to in the Complaint were Sections 29001-29022, the same sections attacked as unconstitutional in appellants' Petition, and the very sections with respect to which appellants sought to enjoin investigation of compliance. (Exhibit A; Tr. Rec., pp. 3-21.)

It is therefore of considerable significance that on April 5, 1962 appellants and appellee (respectively defendants and plaintiff in the State court proceeding) formally stipulated that:

> "[The Superior Court] may issue a judgment permanently enjoining, restraining and prohibiting Technical Publications Investment Corporation, a corporation, Technical Publications Institute, Incorporated, a corporation, Barnarr R. Cannon and Frank Csaszar, and each of them, their successors, officers, directors, agents, servants, employees and all persons acting under, by, through or on behalf of said named defendants, from issuing or conferring, or threatening, promising, or offering to issue or confer any writing evidencing completion of any course of study in the fields of technical

writing, engineering, drafting, electronics, or any combination thereof, or any other course of study which is 'beyond high school' as that term is used in Section 29001 of the California Education Code, without having previously filed the affidavit and appraisal and otherwise having previously satisfied the requirements of Section 29007 subdivision (a) of said Code, or without having previously been licensed, approved, accredited, permitted or authorized so to do, as the case may be, as provided by Sections 29007 or 29007.2 of said Code." (Exhibit B, Paragraph 1.)

This Stipulation recited the pendency of the instant appeal, but did not purport to preserve any standing appellants might have had to prosecute it. (Exhibit B, Paragraph 3.)

"In view of the Declaration of Marie T. Cannon", attached to the Stipulation, the Complaint against her was dismissed with prejudice. (Exhibit B, Paragraph 6.) In the Declaration of Marie T. Cannon referred to, Mrs. Cannon declared under penalty of perjury that while she had been an officer and director of the defendant corporation solely for convenience of Mr. Cannon, in actuality she was "little more than a clerk", that she held no stock, and acted only as directed by Mr. Cannon, and that following her divorce from the latter, she resigned her offices and relinquished all rights and claims to his correspondence school business. She declared that she has no connection with the corporate

defendants, and is powerless to answer for them or for the correspondence school business conducted by them. (Exhibit B, first attachment.)

On April 12, 1962 the Superior Court duly entered its Final Judgment by Court Pursuant to Stipulation, enjoining appellants in the manner provided by the Stipulation. (Exhibit C.)

By their Stipulation for Entry of Judgment and the judgment subsequently entered, each of the appellants save one (Marie T. Cannon) has consented to enforcement against them of the same provisions of the California Education Code attacked below as unconstitutional. The one exception, by her own Declaration, no longer has any interest in appellants' business.

It is submitted that under these circumstances, no substantial justiciable controversy remains between the parties, and that the appeal should for this additional reason, be dismissed as moot.

See: Benz v. Compania Naviera Hidalgo, S.A., 205 F.2d 944, 946-947 (9th Cir., 1953), cert. den. 346 U.S. 885, 74 S.Ct. 135 (1953);

National Bible Knowledge Association v. Dumont Broadcasting Corporation, 239 F.2d 74, 75 (D.C. Cir., 1956);

McCaw v. Fase, 216 F.2d 698, 700 (9th Cir., 1954), cert. den. 348 U.S. 927, 75 S.Ct. 339 (1955).

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III

APPELLANTS' DISREGARD OF THE RULES GOVERNING APPEALS WARRANT DISMISSAL OF THEIR APPEAL

Rule 17.6 of the Rules of this Court provides in part that: "in all cases, . . . the appellant . . ., upon the filing of the record in this court, shall file with the Clerk a concise statement of the points on which he intends to rely."

The instant record on appeal was filed in this court on March 8, 1961, five months after it was due. (Tr. Rec., pp. 32-33.)

Rule 73(c) of the Federal Rules of Civil Procedure provides in part that: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required." Appellants have never filed a bond on appeal.[3]

This Court has remarked more than once that " . . . attorneys should make an attempt to conform to the rules and not try to improvise new practice." See Hargraves v. Bouden, 217 F.2d 839, 840 (9th Circ., 1954). It is

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[3] It is noted that while appellants moved for permission to proceed upon typewritten briefs, permission to proceed in forma pauperis (28 U.S.C. § 1915) was neither sought nor granted.